THE DOCTRINE OF WAIVER

THERE is probably no doctrine of our law so much neglected in scientific discussion, and in legal text-books, as this principle which forms the theme of our essay. The reason for this is difficult to assign, for in point of importance this doctrine takes first rank; and while its boundaries are somewhat confused with the lines of demarcation between the law of contracts and the doctrine of equitable estoppel, it is in reality based upon a body of well established principles. Although much confusion among the cases in which this doctrine has been applied must be conceded, this disorder may be ascribed not to any want of pointedness in the principles themselves but rather to a crudeness in their application.

Notwithstanding this fact, however, many decisions can be found in the books in which the distinctions between the rules that prevail in this field have been fully appreciated. Much of the apparent misconception of the scope of this doctrine has no doubt arisen from the intimate relation between it and the law of contracts on the one hand, and the doctrine of equitable estoppel upon the other, and a considerable portion of this essay will be devoted, indirectly at least, to an effort to unravel this tangle of relations. But first I will pause to consider the history and definition of the doctrine of waiver. Upon the former but little can be said. As a positive individual principle this doctrine is of no great antiquity, but as an integral part of greater principles its past cannot be so easily compassed and must be left to writers on contracts or estoppel to narrate. Its definition is not so easily disposed of. Many definitions are current but they one and all contain partial truths only which unfit them for our purpose, and although I shall consider this matter more in detail after other phases of the subject have been passed, we shall be content here with the declaration that a waiver is the relinquishment of a right either voluntarily made or imposed by law.

Upon the inquiry whether a waiver is a contract or an estoppel we may reply shortly in the words of an Egyptain parable that it is both but is neither, and may be either. An express waiver is without doubt a contract and this waiver is strictly speaking the only true one, the implied waiver being no waiver at all in a literal sense; although because of the language of the courts we must so consider it. To no other waiver would the language of the cases be appropriate. For example a waiver has been spoken of as a "Consent to dispense with a right" and "as an intentional relinquishment of a known right."[1]

[1] Selwyn *v.* Garfit, L. R. 38 Ch. D. 273, 284; Hoxie *v.* Home Ins. Co., 32 Conn. 21, 40.

Waivers have also been considered as releases, it having been said that "A waiver is nothing unless it amounts to a release,"[2] The courts have also declared that "a waiver to be operative must be supported by an agreement founded on a valuable consideration."[3] These statements it must be apparent, however, are only applicable to the express or true waiver and do not form rules for the government of the so-called implied waivers. It can only be concluded therefore that to support an express waiver the elements of a contract must be present, and that this waiver is only supportable by a voluntary intentional release of a fully apprehended right.

All of these elements are not requisites of the implied waivers and a careful distinction must be drawn between the two sorts. For they are based upon totally different principles and depend upon distinct doctrines.

Having concluded that an express waiver must present the essentials of a contract it behooves us to briefly consider the so-called waivers, which for convenience we have called implied waivers. As to these but little can be said at this point although they constitute by far the most important class of waivers. It must be sufficient to say of them here that in the main they should be referred to the principle of estoppel, for upon that doctrine they must rest, and this shows that waivers of this class are not true waivers but are in reality estoppels, since waiver by the very force of the term implies voluntary action directed toward the purpose of waiving, while a waiver under the doctrine of estoppel is imposed from principles of justice and is enforced by operation of law. It is in short an involuntary, compulsory, relinquishment of a right.

This brings us to a more important part of our discussion, viz., whether a consideration is an essential of a waiver and for this we should abandon all attempts to classify waivers as either contracts or estoppels. By consideration is meant the rendering of some equivalent or return for the waiver, either in an actual surrender of something or in some action or inaction in reliance on the relinquishment by the waivant, the result of which will be detrimental if the waivant is permitted to assert his right. If a consideration within this definition is not essential to both an expressed and an implied waiver we are here confronted with a novelty in the common law which is in all its ramifications tributary to the principle of compensation, the measuring out of justice, this for that.

Among the maxims given by Broom is one which translated reads that "He is not heard who alleges inconsistent propositions." This

[2] Stackhouse *v.* Barnston, 10 Ves. Jr. 453, 466.

[3] Ripley *v.* Aetna Ins. Co., 30 N. Y. 136, 164; Mutual Ins. Co. *v.* LaCroix, 45 Tex. 158.

has many times been suggested as a basis for the doctrine under discussion.[4] For example it has been suggested that the so-called waiver of jurisdiction is attributable to it. There is in reality, however, no such thing as a waiver of jurisdiction for the appearance which is supposed to waive the jurisdiction in and of itself confers jurisdiction as it is a submission to the power of the court.[5] As has been said "Appearance of the defendant is in and of itself a formal act of great importance, for it is the process or act by which a person against whom a suit has been commenced submits himself to the jurisdiction of the court. If the defendant makes his appearance for that special purpose he may take advantage of the defective execution or of the non-execution of the notice or process. But if his appearance is general or for any other purpose he thereby waives all objection to the defective execution or non-execution of the notice or process."[6]

This waiver of jurisdiction as well as other waivers of procedure are therefore in reality not waivers in any sense and should not affect our discussion or our conclusions. In this same class may be included the waiver which is said to occur when a litigant neglects to raise a point of law in the trial court and it is said that he has waived it in the appellate tribunal this also is not in any true sense a waiver, the truth being that the appellate court can only consider errors to which exceptions are taken, its jurisdiction being dependent upon the bill of exceptions, and it cannot of course review what does not there appear. That this is the true basis for the rule precluding the consideration of points not raised below is made yet more pointed by the fact that all matters involved are tried out when there is a trial de novo on appeal.

Passing the consideration of this matter we arrive at the implied waivers, and find that the courts very generally require a consideration, within our definition of a consideration, before holding that there has been a waiver. That is, a waiver will not be implied unless the party in whose favor it is to operate has been led to place himself in such a position that he will be prejudiced if the other is allowed to assert a claim or right which by conduct he has led the other to believe has been abandoned. Thus it has been said "A man is not to be deprived of his rights unless he has acted in such a way as would make it fraudulent for him to set up those rights."[7] To the same effect is the holding that to amount to a waiver there

[4] Broom's *Legal Maxims*, 160.

[5] Insurance Co. *v.* Johnson, 46 Ind. 315; Woldenberg *v.* Haynes, 35 Ore. 246, 57 P. 627.

[6] Groves *v.* Grant County Court, 42 W. Va. 587, 26 S. E. 460.

[7] Wilmott *v.* Barber, 49 L. J. Ch. 792, 15 L. R. Ch. D. 105.

must be a clear, unequivocal and decisive act showing a purpose to waive or acts amounting to an estoppel.[8] Again it has been said that a waiver must be by agreement for a consideration "Or the act relied on as a waiver must be such as to estop the party,"[9] and these cases I esteem are in harmony with the true rule notwithstanding some respectable authority to the contrary. Thus it has been said that a condition in an insurance policy is not dependent on nor supported by a consideration and therefore may be waived or dispensed with even by an agreement without a consideration.[10] Again in an insurance case "it may be asserted broadly that if in any negotiations or transactions with the assured without knowledge of the forfeiture, it (The Company) recognizes the continued validity of the policy or its acts based thereon, or requires the assured by virtue thereof to do some act or incur some trouble or expense the forfeiture is as a matter of law waived, and it is now settled in this court that such a waiver need not be based on a new agreement or estoppel."[11] Likewise it has been held as a proposition deducible from the English and American cases that a waiver of conditions or forfeiture arising from a breach thereof by an assured need not be founded on any new consideration.[12]

These illustrations or statements "pro" and "con" upon this matter are sufficient for the purpose of this discussion and clearly show the conflict which has arisen in applying the doctrine of waiver. These latter cases can be ascribed to the maxim which we spoke of earlier in the discussion, viz., that one may not occupy inconsistent positions, and that having elected to follow a particular course with respect to a certain right one may not be permitted by inconsistent conduct to follow another course. It must be admitted that a very large number of the American authorities as well as many English cases have proceeded upon the theory, if not spoken at least implied, that a waiver need not be supported by a consideration, either as such consideration is intended in the law of contracts or as we have defined it for the purposes of this essay. Why this is true it is difficult to imagine, for our courts have uniformly refused to apply the doctrine of estoppel unless some injury had resulted, or would result, to the party setting up the estoppel if the other party were not estopped.

Again our courts have with equal uniformity refused to accept as valid anything purporting to be a contract for which there was no

[8] Ross *v.* Swan, 7 Lea (Tenn.) 463, 467.
[9] Ripley *v.* Aetna Ins. Co., 30 N. Y. 136; Mutual Ins. Co. *v.* LaCroix, 45 Tex. 158.
[10] Viele *v.* Germania Ins. Co., 26 Ia. 9.
[11] Titus *v.* Glens Falls Ins. Co., 48 N. Y. 419; Weed *v.* London Ins. Co., 116 N. Y. 106.
[12] Georgia Home Ins. Co. *v.* Kinniers, Administrator, 28 Grattan (Va.) 88: 109.

evidence of consideration. What logic is there then in this new rule which permits one to be deprived of a right merely because of his previous failure to assert it or because of his previous conduct inconsistent with its assertion when the party against whom it is operative has not in any sense been injured by the non-assertion? It seems to me that in no case should a waiver be implied from the conduct of the waivant or from his non-assertion of a right, nor from his assertion of an inconsistent right unless some prejudice would result to the party against whom the right may be asserted any more than such parties should be estopped when there has been no prejudice of the party by the conduct upon which it is sought to raise the estoppel. We believe it must be concluded, cases to the contrary notwithstanding, that the maxim "He is not heard who alleges things that are inconsistent" should not found a waiver nor an estoppel unless some consideration within our definition has passed to the party against whom the waiver or estoppel is alleged. That is, we believe that in order that the conduct shall amount to a waiver, even though it be inconsistent with the assertion of the right which it is sought to be shown has been waived, must in some way have so prejudiced the party setting up the waiver that it would be inequitable for him to permit the right to be asserted against him.[13]

We arrive at this conclusion with all deference to the eminent authority to the contrary, but firmly convinced that such conclusion is the only logical one deducible from the whole trend of our law, and is the only one conformable to the equal justice which our law seeks to attain.

The next inquiry demanding attention is whether it be essential that the one against whom the waiver is asserted shall have intended the waiver. Very many cases insist that an intention is essential.[14] These cases, however, if sifted to the bottom will, nearly all of them, with one or two possible exceptions, be found not inconsistent with the rule that a waiver must indeed be intended, unless the conduct of the party possessing the right is such that it would be inequitable for him after the other party has relied upon his waiver to again assert the right, as was said in *Kent* v. *Warner,* 12 Allen (Mass.) 561: "Strictly speaking a waiver is an intentional relinquishment of a known right. But where the endorser of a note by words or acts has in fact misled the holder and put him off his guard and induced him to omit due presentment and notice of non-payment, he is

[13] Stackhouse *v.* Barnston, 10 Ves. Jr. 453, 466.

[14] Hoxie *v.* Home Ins. Co., 32 Conn. 21; Stewart *v.* Crosby, 50 Me. 130; Weed *v.* London Ins. Co., 116 N. Y. 106; Shaw *v.* Spencer, 100 Mass. 382; Diehl *v.* Adams Co. F. Ins. Co., 58 Pa. St. 443; Bennecke *v.* Conn. Mut. L. Ins. Co., 105 U. S. 355, 359; Holdworth *v.* Tucker, 143 Mass. 369, 374.

deemed in law to have waived the performance of these ceremonies, because it would be inconsistent with good faith on his part to insist upon a condition, compliance with which has been prevented by his own conduct."

The true rule then is that there must have been an intention to waive in order that a waiver shall be effectual; or there must be such conduct on the part of the party desiring to assert the right relied upon by the party against whom the right is sought to be asserted as will make it inequitable to any longer claim that the right exists.

The next principle in point of importance under this general doctrine is necessity for a knowledge of the facts upon the part of the one against whom the waiver is asserted. Briefly stated, the rule is this: That either there must be an intention to waive the right or there must be such conduct on the part of the possessor of the right with knowledge of the facts and of the right which it is claimed that he has waived that it will be inequitable and unjust to the adverse party for him longer to assert it.

This matter of knowledge is a subject of primary importance to the so-called implied waiver, and if there is not such knowledge the waiver cannot arise. For clearly on the one hand a party cannot be said to have waived that of which he had no knowledge; and on the other it may not be maintained that it would be inequitable to claim that which he previously did not claim because he did not then have knowledge of his right to make the claim.[15]

By the term knowledge, however, is not meant absolute and certain intelligence of the exact scope of the right or of the facts upon which it is based, but sufficient intelligence from which its general limits may be ascertained, or what is termed virtual knowledge. That is, such a neglect to learn the scope and extent of the right, or to gain a knowledge of its existence as will make ignorance inexcusable or raise an equity on the behalf of the party who sets up the waiver to prevent the assertion of the right. Under these circumstances the law presumes that he knew that the right existed or insists that he should have known it, and that inasmuch as he should have known it and in ignorance of the right has by his conduct induced the other party to forego some action or prejudice himself in some way, in reliance upon the non-assertion of the claim, the law compels him to bear the result of his own neglect to inform himself as to his rights and implies a waiver of them.

Heretofore we have not considered any distinction in the matter of waivers or rights existing under contracts, whether written or

[15] Webster *v.* Phoenix Ins. Co., 36 Wis. 67; Bennecke *v.* Conn. Mut. L. Ins. Co., 105 U. S. 355, 359; Montague *v.* Massey, 76 Va. 307, 314.

oral, and it must at once impress the reader that there might be a grave question as to the validity of a parol waiver of a written contract or of some condition or agreement in such written contract. That is, it may pertinently be inquired, how can a formal contract be waived by parol? What right has one, who, by his solemn written agreement, has promised to perform a certain act or to confer a benefit upon some one else, to insist that that other by less formal acts has waived the right which the solemn contract, entered into with due deliberation, has conferred? That such formal contract or condition therein may be waived by parol is nevertheless the rule, and a fortiori, conduct, which would make it inequitable for the claimant or possessor of the right to assert it against the other party, who has relied upon his conduct to believe that it will not be asserted, will amount to a waiver of the benefit conferred by the written contract, or by a virtual estoppel will prevent the assertion of the breach of the condition of the formal agreement.

Thus it has been held that the waiver of a forfeiture arising from the breach of a condition in a policy of insurance need not be in writing but may be by parol, at least in a case where the policy is not attested by the corporate seal of the company, and is hence not a specialty.[16] In fact it may be said to be the weight of authority that a waiver may be by parol.[17] And this rule has been extended to include contracts under seal.[18]

It is uniformly held that the rule excluding parol evidence to vary a written instrument is not operative to exclude evidence that such written instrument has been discharged or waived, or that the damages for its non-performance have been waived, or that the performance of a part of it has been dispensed with.[19] No other rule in regard to the proof of waiver could be adhered to that would harmonize its principles, for if it be conceded that acts or conduct, the result of which would be an inequity to the party against whom the right claimed to be waived is available, are sufficient to raise the waiver it is at once necessary to open the door to parol proof of such acts, inasmuch as they themselves are not provable in any other way. The contract cannot be said in any logical sense to be varied, or added to, or diminished, by such parol waiver, within the

[16] Georgia Ins. Co. *v.* Kinniers, Administrator, 28 Grattan (Va.) 88; Viele *v.* Germania Ins. Co., 26 Ia. 9.

[17] Boyce *v.* McCullough, 3 W. & S. (Pa.) 429; Raffensberger *v.* Cullison, 28 Pa. St. 426; Wood *v.* Potter, 1 Barb. (N. Y.) 114.

[18] Mayor of New York *v.* Butler, 1 Barb. (N. Y.) 325.

[19] Viele *v.* Germania Ins. Co., 26 Ia. 9; Seymour *v.* Carter, 2 Metc. 520; Vroman *v.* Darrow, 40 Ill. 171; Leathe *v.* Bullard, 8 Gray (Mass.) 545; Fuller *v.* McDonald, 8 Me. 213, 23 Am. Dec. 499; Annville Nat'l Bank *v.* Kettering, 106 Pa. St. 531.

rule excluding parol proof under such circumstances, since the waiver is subsequent to and not contemporaneous with the making of the contract, and therefore does not prevent the writing being a literal recital of the intention of the parties at the time it was entered into. The waiver is simply the result of subsequent acts or conduct, and does not tend to prove that the contract did not exist at the time it was made, as evidenced by the writing, but simply that it has subsequently been discharged or changed.

It also becomes interesting to inquire as to the persons who are competent to waive their rights, and as to this point it may be expressed as a general rule that any person of full age, sound mind, and under no restraint, is competent to waive any right, and that this waiver is just as effectual if made by a corporation through its duly qualified officers or agents as though made by an individual.[20] The converse of this proposition is equally true, for neither an infant nor a person of unsound mind, like an habitual drunkard,[21] can make an effectual waiver of his legal rights.

The rule as to the right to take advantage of a waiver is broader than the rule as to who is competent to waive, and it has been declared that any person is entitled to take advantage of a waiver of a forfeiture of insurance by breach of condition that is entitled to take under the policy. From this it is deducible that any one in privity with the person who would first be entitled to set up the waiver may insist upon the benefit of it. That is to say the waiver will inure to the advantage of any one against whom the same identical right is available that was available at the time of the waiver against the party who in the first instance was entitled to set it up.[22]

Finally it is of interest to know what rights may in general be waived and what may not be. As a general proposition it may be laid down that any right may be waived unless the waiving of it would be contrary to public policy. That is to say, if the waiver would result in the assertion of a right contrary to the law of the land or to the policy of government, then such waiver would be ineffectual. For example, the common case is that of a contract to waive usury, which the courts have universally declared to be invalid.[23]

These cases, with many others which might be added to this list, but the addition of which would not lend any strength to our essay, proceed upon the principle that a contract to waive usury, if held

[20] Seelye *v.* Jago, 1 P. Wms. 389; Bonnell *v.* Holt, 89 Ill. 71.

[21] Wadsworth *v.* Sharpstein, 8 N. Y. 388.

[22] Frank *v.* Mut. L. Ins. Co., 102 N. Y. 266, 6 N. E. 667, 55 Am. Rep. 807.

[23] Mabee *v.* Crozier, 22 Hun. (N. Y.) 264; Bosler *v.* Rheim, 72 Pa. St. 54; Clark *v.* Spencer, 14 Kas. 398.

to be valid, would be no more than a simple and effectual way of evading the law prohibiting the taking or exacting of usurious interest. Likewise, inasmuch as it is a matter of public policy that a contract shall not be made upon the Sabbath day, if such contract be made upon the Sabbath, then the invalidity of that contract by reason of the time of its execution, may not be waived for a reason similar to that which prevents the waiving of the defense of usury, viz., since the parties might then avoid the consequence of the statute.[24]

One other illustration of rights which cannot be waived are those which arise under the statute requiring employers to furnish suitable places for their employes to work in, and to guard machinery with which the employes are required to work. Thus it has been held, not without considerable dissent, it must be admitted, but nevertheless by the great trend of authority, that when the statute requires a master to provide certain devices for the safety of his employes about their work, the employes cannot assume the risk upon the failure of the master to provide such safety devices as required by the statute.[25] These cases proceed upon a ground like those discussed above, viz., that to permit the waiver of the right given by statute would be to permit the evasion of the statute and the practical nullification of its terms and of the benefits intended to be secured by its enactment.

That these conclusions of our court are sound cannot be gainsaid, and notwithstanding the dissent from these opinions by eminent jurists in other courts, the rule of law maintained by these decisions bears the stamp of sound logic.

To recapitulate: We have then a waiver consisting of a relinquishment of a right or claim, possible to be made either orally or in writing, and to be either expressed or implied, requiring a consideration or facts equivalent to an estoppel to support it, only possible to be made with knowledge of the facts by a person of full age, sound mind, and under no restraint, and only valid when not contrary to public policy or the rules of law.

Thus, in a general way, we have compassed a subject of great importance and grave intricacy without an attempt at a detailed examination of all authorities, but only with an effort to mark the more important principles essential to this doctrine and show clearly what they are and when they exist.

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[24] Taylor *v.* Phillips, 3 East, 155; Day *v.* McAllister, 15 Gray (Mass.) 433.

[25] Narramore *v.* Railway Co., 37 C. C. A. 500; Sites *v.* Michigan Starch Co., 11 D. L. N. 287, 100 N. W. 447.